United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1129

To be argued by
JERRY L. SIEGEL

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1129

UNITED STATES OF AMERICA,
Appellee.

—v.—

ANGELO RICCO, JAMES RIZZIERI, and CHARLES INDIVIGLIA, a/k/a "CHARLIE POOPS",
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Angelo Ricco ("Ricco"), James Rizzieri ("Rizzieri") and Charles Indiviglia, a/k/a "Charlie Poops" ("Indiviglia") appeal from judgments of conviction entered on March 5, 1976, and March 9, 1976 in the United States District Court for the Southern District of New York, after a three week trial before the Honorable Morris E. Lasker, United States District Judge and a jury.

Indictment 75 Cr. 411, filed April 23, 1975, charged twelve defendants in eleven counts with conspiring to violate and substantive violations of the federal narcotics laws.

Count One charged all appellants and Anthony Ricco, a/k/a "Tony Bragiole", ("Bragiole"),* Michael Puglisi

* Bragiole is the uncle of Angelo Ricco.

a/k/a "Mike Siciliano", Anthony Zinzi, Willard Williams, a/k/a "Trees", Saint Julian Harrison, a/k/a "Harry", George Corrado, Anthony Spitalieri, a/k/a "Tony Spits", a/k/a "Tony from Cleveland", John Di Salvo and Freddie Blase, under Title 21, United States Code, Section 846, with conspiring to violate the federal narcotics laws from on or about January 1, 1971 through December 30, 1973.

Count Two charged Ricco and Indiviglia with distributing and possessing with the intent to distribute approximately one kilogram of cocaine in or about August or September 1972. Count Three charged George Corrado with distributing and possessing with intent to distribute one-eighth of a kilogram of heroin in or about October or November 1972. Count Four charged Ricco, Rizzieri and Bragiole with distributing and possessing with intent to distribute approximately 461.9 grams of heroin on or about November 22, 1972. Count Five charged Ricco, Rizzieri and Bragiole with distributing and possessing with intent to distribute approximately two kilograms of heroin in or about November or December 1972. Count Six charged Di Salvo with distributing and possessing with intent to distribute one-eighth of a kilogram of heroin in or about May, 1973. Count Seven charged Ricco and Bragiole with distributing and possessing with intent to distribute approximately one kilogram of cocaine in or about May or June 1973. Count Eight charged Michael Puglisi, a/k/a "Mike Siciliano", with distributing and possessing with intent to distribute approximately one kilogram of cocaine in or about July or August 1973. Count Nine charged Anthony Spitalieri, a/k/a "Tony Spits", a/k/a "Tony from Cleveland", with distributing and possessing with intent to distribute approximately one-fourth kilogram of cocaine in or about August 1973. Count Ten charged

defendant Willard Williams, a/k/a "Trees", with distributing and possessing with intent to distribute approximately one-half kilogram of cocaine in or about August 1973. Count Eleven charged Ricco and Bragiole with possessing with intent to distribute approximately three kilograms of heroin in or about October 1973.

Trial commenced on January 5, 1976, against appellants and defendants John Di Salvo, George Corrado and Freddie Blase. The remaining defendants were severed prior to trial.* Defendant Blase was severed during the trial.**

On January 23, 1976, the jury found Ricco, Rizzieri, Indiviglia, and Di Salvo guilty on all counts in which they were charged. The jury found Corrado guilty on Count One, the conspiracy count, and not guilty on Count Three, a substantive count.

On March 5, 1976, Judge Lasker sentenced Ricco to concurrent terms of five years' imprisonment on Counts One, Two, Four, Five, Seven and Eleven, to be followed by five years' special parole, with the sentence on Count Two suspended and Ricco placed on probation for five years to commence immediately. Judge Lasker sentenced Rizzieri to five years' imprisonment on Counts One, Four, and Five, the sentences to run concurrently with each other and with the sentence Rizzieri was then serving for another federal narcotics conviction, to be followed by six years' special parole. Judge Lasker sentenced

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* Defendants Puglisi, Zinzi, Williams, Harrison and Spitalieri were severed on consent of the Government. Defendant Bragiole was severed over the Government's objection.

** Defendant Biase plead guilty to Count One on April 22, 1976.

Corrado on Count One to four years' imprisonment to run concurrently with the state sentence Corrado was then serving, to be followed by six years' special parole.*

On March 9, 1976, Judge Lasker sentenced Indiviglia as a second federal narcotics felon to five years' imprisonment on Count One, to be followed by six years' special parole. Judge Lasker suspended imposition of sentence on Count Two and placed Indiviglia on probation for a period of five years to commence immediately.

On March 26, 1976, Judge Lasker sentenced Di Salvo to three years' imprisonment on Count One to be followed by five years' special parole. Judge Lasker suspended imposition of sentence on Count Six and placed Di Salvo on probation for a period of five years to commence immediately.**

Ricco and Indiviglia are at liberty pending appeal. Rizzieri is serving a federal sentence on a separate narcotics conviction.

Statement of Facts

A. The Government's Case

1. Introduction.

The Government's evidence, presented through the testimony of nine witnesses and numerous exhibits, established a single domestic narcotics chain conspiracy designed to place narcotics in the hands of their ultimate users. This narcotics conspiracy was described at trial

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* Corrado has not appealed his conviction in this case.

** Di Salvo has withdrawn his appeal in this case.

through the testimony of co-conspirators Albert Rossi, Gary Pearson and Peter Mengrone,* which was corroborated by the other evidence. Ricco and Bragiole were the suppliers of the narcotics. They supplied over fifty pounds of heroin to Rossi, Rizzieri, and Blase, who in turn distributed these narcotics to numerous customers including Corrado and Di Salvo. Indiviglia, who was a close associate of Bragiole and Ricco, also distributed narcotics for and with this organization.

After Rossi and Rizzieri withdrew from the conspiracy—Rizzieri as a result of his arrest and Rossi because of a disagreement with Bragiole and Ricco, Mengrone began his employment with this narcotics organization, which continued until his arrest in October, 1973.

2. The Conspiracy Begins.

In February or March, 1971, Rossi borrowed $5,000 from Bragiole with which he unsuccessfully attempted to import cocaine into the United States (Tr. 67-69).**

In October or November, 1971, after Rossi was unable to repay this debt in full, he met with Bragiole and Ricco in the Bronx and it was agreed that Bragiole and Ricco would supply Rossi with narcotics on consignment which Rossi would resell to customers thereby generating enough cash with which to satisfy his debt to Bragiole (Tr. 70-72). Thereafter Rossi and his then partner, defendant Freddie Blase, began to receive ounce quantities of high quality heroin from Bragiole and Ricco and, after diluting

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* Rossi, Pearson and Mengrone plead guilty prior to trial to related state and federal narcotics charges.

** "Tr." refers to the trial transcript; "GX" refers to Government exhibits.

them to commercial ounces,* resold them to their customers. From October 1971 through July 1972, Rossi and Blase made approximately 18 purchases of heroin from Bragiole and Ricco and received approximately $20,000 from sales of this heroin to their narcotics customers (Tr. 89, 95-96, 98, 100, 113).**

In March, 1972, Indiviglia, who was present on occasion when Rossi was making arrangements to buy heroin from Bragiole and Ricco, delivered two ounces of heroin, along with Ricco, to Rossi and Blase at a sea food restaurant in the Bronx which was owned by Rossi and Blase (Tr. 102-05, 110).

3. Rizzieri becomes Rossi's partner and they purchase approximately fifty pounds of heroin from Bragiole and Ricco for approximately $150,000 in cash.

In July, 1972, Rossi, Blase and others went to Puerto Rico where Rossi met Rizzieri at the Flamboyan Hotel and agreed with him to form a narcotics partnership when they returned to New York (Tr. 124-30).

After Rossi returned to New York he met with Bragiole and Ricco and told them that he was taking on a new partner, Rizzieri, and that they wanted to buy greater quantities of heroin from them. Bragiole and Ricco agreed to supply them with heroin (Tr. 131-35).

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* A commercial ounce of heroin was defined as an ounce of heroin which has been fully diluted and is ready, after the appropriate measurements have been made, for injection by an addict (Tr. 82).

** During this period Rossi took on other partners besides Blase (Tr. 101).

Thereafter, from August through December, 1972, Rossi and Rizzieri in the course of forty to fifty transactions purchased approximately fifty pounds of high quality heroin from Bragiole and Ricco which they in turn distributed to their numerous narcotics customers (Tr. 144-57). From these heroin sales Rossi and Rizzieri received at least $200,000 in cash of which they paid approximately $150,000 to Bragiole and Ricco (Tr. 157-58).*

Arrangements for the sale of this heroin to Rossi and Rizzieri were generally made during meetings among Rossi, Rizzieri, Bragiole and Ricco. During many of these meetings Indiviglia was also present (Tr. 155-56).**

In November, 1972, while they were receiving heroin from Bragiole and Ricco, Rossi and Rizzieri sold one-eighth of a kilo of heroin to Di Salvo (Tr. 174-79).

4. Rossi withdraws from the conspiracy.

In December, 1972, Rossi and Rizzieri purchased two kilos of heroin for $56,000 from Bragiole and Ricco which the latter represented to be pure heroin (Tr. 200-05).*** Rossi and Rizzieri attempted to sell these two kilos to one of their narcotics customers and represented that they

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* After Rossi and Rizzieri returned from Puerto Rico in late July or early August, 1972, they phased Blase out of their narcotics partnership (Tr. 134, 142).

** Indiviglia and Ricco, in August, 1972, sold Rossi and Rizzieri one kilo of cocaine most of which was later returned because of poor quality (Tr. 162-72). From August to December, Indiviglia gave Rossi five or six cocaine samples but no sale was consummated (Tr. 173-74).

*** In this period Bragiole told Rossi the heroin he and Ricco were selling Rossi was coming from Marseilles, France (Tr. 196-97).

consisted of pure heroin. After delivery of the two kilos, it was discovered by the customer that it was only 50% heroin rather than pure, and the heroin was returned to Rossi and Rizzieri. They in turn attempted to return it to Bragiole and Ricco who refused to take it back, claiming that Rossi and Rizzieri were committed to buy it (Tr. 200-12).

In January, 1973, after Rossi and Rizzieri had paid approximately $30,000 of the $56,000 purchase price for the two kilos, Rossi and Rizzieri met Bragiole and Ricco. During this conversation, which became quite heated, Bragiole and Ricco insisted that Rossi was responsible for the balance of the money owed for the two kilos, $26,000, notwithstanding Rossi's protestations that he and Rizzieri were both responsible for their share, namely, $13,000 each. The meeting ended with Rossi pulling a gun on Rizzieri and telling him that they each were responsible for $13,000 and that their partnership was at an end (Tr. 213-19).

Thereafter, although Rizzieri continued to purchase heroin from Bragiole and Ricco, Rossi did not do so and terminated his narcotics relationship with them and Rizzieri (Tr. 220). In February, 1973, Rossi went to Ricco's home, situated on Hollywood Avenue in the Bronx in the vicinity of the St. Raymond's Cemetery, and personally gave Ricco $13,000 in cash. Ricco told Rossi that he was still responsible for the remaining $13,000 and Rossi agreed. He never paid it and did not see Ricco again * (Tr. 220-22).

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* Rossi's relationship with Ricco was not always so strained. On December 10, 1972, prior to the two kilo purchase from Ricco and Bragiole, Ricco participated in a religious ceremony as Godfather to Rossi's child during the child's christening. Photographs were taken during this ceremony and the subsequent celebration which were admitted into evidence (Tr. 181-84; GX 9A-F).

5. Mengrone joins the conspiracy.

In September, 1972, Peter Mengrone * and his cousin, Georgiana Kunik, opened a bar called the Magic Carpet on Morris Park Avenue in the Bronx (Tr. 1219). This bar was frequented on numerous occasions from September, 1972, through June, 1973, by Ricco, Rizzieri, Bragiole, Di Salvo, Rossi and Indiviglia,** combinations of whom Mengrone observed on several occasions furtively entering the bathroom and the kitchen or leaving the bar together (Tr. 1219-29).

In December, 1972, Ricco and Renzo Baronti *** gave Mengrone, who was in financial difficulty, $8,000 in cash to be invested in the Magic Carpet to defray expenses, in return for a one-half ownership share in the bar (Tr. 1235-37).

In March, 1973, Rizzieri was arrested on other federal narcotics charges (Tr. 1247-48).**** Following

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* Mengrone plead guilty to related state narcotics charges prior to trial and testified for the Government.

** Rossi stopped coming into the bar in late December, 1972 (Tr. 1234-35).

*** Baronti testified in Ricco's behalf at trial.

**** Special Agent Donald Ferrarone of the Drug Enforcement Administration testified that on November 22, 1972, while acting in an undercover capacity, he purchased one-half kilo of heroin from Peter Angiolillo, a/k/a "Pete the Weep" in the presence of Rizzieri (Tr. 827-32). On February 8, 1973, Ferrarone purchased an additional one-eighth kliogram of heroin for $3600 from Rizzieri (Tr. 842-45). On March 14, 1973, Ferrarone arrested Rizzieri and seized from him an additional 223.8 grams of heroin along with a quantity of currency (Tr. 847-53). Subsequent to Rizzieri's arrest, Peter Donovan who was with Rizzieri at the time of his arrest and who was also arrested, told Ferrarone that Rizzieri received the heroin which was seized from him at the time of his arrest from Bragiole (Tr. 867-69).

Rizzieri's arrest, Mengrone delivered a message to Ricco and Bragiole, which Mengrone had received from Rizzieri's girlfriend, to the effect that Rizzieri was "going to stand up and do the time and that nobody had to worry, and despite everything they might have heard that he was going to take the fall himself and not implicate anybody" (Tr. 1251-54).

In May, 1973, Mengrone, who then owed approximately $25,000 to various loansharks and had sold his remaining one-half interest in the Magic Carpet to Ricco for a $3000 interest free loan, met with Ricco and Bragiole. He told them of his serious financial trouble, and asked them to permit him to work in their narcotics business. Bragiole agreed to permit Mengrone to do so and told Mengrone that he should "reach out for customers" for heroin and cocaine (Tr. 1254-57).

6. Mengrone works for Bragiole and Ricco.

In June, 1973, Mengrone, after conferring with Ricco and Bragiole, made arrangements to sell a kilo of diluted cocaine, which Ricco and Bragiole had on hand, to Nick Visciglia, and with the proceeds of this sale to purchase a kilo of pure cocaine from Gary Pearson * and Di Salvo.** The transaction was aborted when it was discovered that Pearson and Di Salvo were going to buy

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* Pearson also testified to this aborted transaction (Tr. 971-72, 979-83).

** In May 1973, Di Salvo, accompanied by Pearson, drove to the East Tremont section of the Bronx in the vicinity of the St. Raymond's cemetery for the purpose of picking up one-eighth kilo of heroin, which Di Salvo had arranged to sell to one of his narcotics customers. When they arrived in the vicinity of the cemetery, they parked the car and took a walk. When they returned to the car, Di Salvo found the one-eighth kilo under the

[Footnote continued on following page]

the cocaine, which they had proposed to sell to Mengrone, from Visciglia and his partner, who were supposed to purchase the kilo of cocaine from Mengrone (Tr. 1258-68).

When Pearson discovered that the proposed transaction was circular, he blamed Mengrone and proposed to Di Salvo that they force Mengrone to pay them for the time they wasted attempting to consummate the transaction. Di Salvo responded by saying that there was a relationship between Bragiole and Di Salvo's father-in-law, Rusty Rastano, which would develop into a problem for Di Salvo and Pearson in the future if they forced Mengrone to pay them (Tr. 982-83).

In early July, 1973, Mengrone, Ricco and Bragiole agreed to purchase 6 kilos of pure heroin from co-conspirator James Venia for $210,000. Bragiole told Mengrone that they would accomplish the transaction by first buying one kilo, testing it for purity and, if acceptable, purchasing the remaining 5 kilos. Bragiole later instructed Mengrone to go to Ricco's house to pick up $35,000 with which to buy the first kilo but under no circumstances to give the money to Venia in advance of Venia's delivering the heroin to Mengrone. Mengrone then went to Ricco's house and Ricco gave him $35,000 which he took from a shopping bag filled with cash. The next day Mengrone, contrary to Ricco's and Bragiole's instructions, gave Venia $33,000 * on Venia's promise that he would give Mengrone the kilo at a later time. When the kilo was not produced, Venia told

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driver's seat of the car. They later sold it to Di Salvo's customer (Tr. 965-69). Di Salvo did not tell Pearson the identity of his source of supply for the one-eighth kilo.

In May 1973, Ricco resided on Hollywood Avenue in the vicinity of St. Raymond's cemetery (Tr. 220-22, 1262-64).

* Mengrone embezzled $2,000 for himself (Tr. 1272).

Mengrone that Venia's connection, Blackie, took the money but did not return with the heroin. Venia supplied Mengrone with Blackie's name and address, "where the wife and kids and himself are residing," and suggested to Mengrone that Mengrone's people "track him down." After Mengrone related what had happened to Bragiole and Ricco, who were quite upset about the loss of the money, Bragiole told Mengrone not to be concerned because they had the address and as Bragiole put it, "We will snatch one of his kids and we'll see how quick the guy comes back with the money." Mengrone told them he wanted no part in the kidnapping of children (Tr. 1268-76).

In late September or early October, 1973, Bragiole told Mengrone that he had just received a shipment of heroin and that Mengrone should meet him that evening in front of the Magic Carpet to pick up a sample to be delivered to one of Mengrone's prospective customers. While Mengrone was waiting in his car in front of the Magic Carpet for Bragiole to arrive with the sample, Indiviglia came out of the bar, walked over to Mengrone's car and asked him how he was doing. Mengrone told him he was in the middle of a major narcotics transaction and that he hoped Bragiole would arrive with a sample so that the transaction could be consummated. Indiviglia responded by saying that he was certain Bragiole would come because he was himself waiting for Bragiole to arrive to deliver one-quarter kilo of heroin to him. Indiviglia continued: "I've got the money for it, I've got the guy waiting now, so if [Bragiole] says he'll be here, he'll be here, don't worry about it." (Tr. 1280-82).

After Indiviglia returned to the bar, Bragiole arrived, got into Mengrone's car and gave him the heroin sample which was to be given to Mengrone's prospective customer. While they were in the car Indiviglia came out

of the bar, called to Bragiole, who joined him, and they both entered the Magic Carpet (Tr. 1282-83).

Thereafter, Mengrone gave the sample to his prospective customer but no deal was consummated (Tr. 1282-84).

7. Mengrone is arrested.

In late October, 1973, Mengrone was arrested by state authorities while he was in the midst of a proposed transaction to sell three kilos of heroin, which he was to get from Bragiole and Ricco, to an undercover agent for $105,000 (Tr. 1302-15).

A. The Defense Case

Ricco was the only appellant to present evidence in his defense. Ricco did not testify but presented the testimony of Renzo Baronti and Georgiana Kunik.

Baronti testified that Rossi never gave him a package or a payment of money to be given to Ricco (Tr. 1572).* He also denied that Ricco and he had ever given Mengrone $8,000 for an interest in the Magic Carpet.**

Kunik, Mengrone's cousin, testified that she and Mengrone opened the Magic Carpet in September, 1972 (Tr. 1637-39). Thereafter, Mengrone began to steal money from the cash-register (Tr. 1650). Mengrone, according to Kunik, was not a truthful person (Tr. 1650).

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* Rossi had testified that on one occasion he had given Baronti a sum of money and asked him to give it to Ricco (Tr. 158-59, 386-87).

** Mengrone testified that Ricco and he had done so (Tr. 1235-37).

ARGUMENT

POINT I

The proof at trial showed the existence of a single conspiracy.

Ricco, Indiviglia and Rizzieri each claim that the Government's proof at trial demonstrated the existence of an unspecified number of separate conspiracies, rather than the single conspiracy charged in Count One of the indictment. The evidence, however, quite clearly established one conspiracy which extended from October of 1971 through October of 1973. Hence, the jury's finding of the single conspiracy charged, pursuant to the court's instructions, which were correct and unobjected to below was entirely proper and supported by the evidence.

The proof at trial demonstrated the existence of a classic single chain narcotics distribution conspiracy. See *United States* v. *Leong*, Dkt. No. 76-1001 (2d Cir. June 23, 1976), slip op. 4347. The suppliers of the narcotics in the conspiracy were Angelo Ricco and his uncle, Anthony Ricco a/k/a "Tony Bragiole," the latter having been severed from the case by the trial court over the Government's objections.* The evidence showed that during the period of the conspiracy the Riccos ** supplied over fifty pounds of heroin to Rossi, Rizzieri and

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* Anthony Ricco, a/k/a "Tony Bragiole", was severed based upon a representation that Angelo Ricco wished to testify for Anthony Ricco but did not wish to testify in his own behalf. Judge Lasker felt that this required severing Anthony Ricco from the case and the defendant's motion was granted.

** The "Riccos" are appellant Angelo Ricco and his uncle, Anthony Ricco, a/k/a "Tony Bragiole", hereafter referred to individually as "Bragiole".

Blase who in turn distributed these narcotics to their customers, including Corrado and Di Salvo.

This case is thus totally unlike the facts depicted in *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), so heavily relied upon by appellants. In *Bertolotti*, the court concluded that the single conspiracy which was charged in the indictment was actually an improper consolidation of at least four separate and unrelated criminal ventures, some, but not all of which, involved narcctics, and others of which involved non-drug transactions such as cash theft. The court found lacking "mutual dependence and assistance" among the spheres of the operations and "any real organiation" conducting "a regular business on a steady basis," * both of which exist in this case.

Unlike *Bertolotti* the evidence here showed the existence of a compact narcotics distribution operation in which each member of the conspiracy knew the other members of the conspiracy and in which the members were personally involved in narcotics transactions with one another on a regular basis throughout the period of the conspiracy. This remained the case during the life of the conspiracy despite some changes in its membership.**

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* Despite appellants' incessant invocation of this court's decision in *Bertolotti*, as if repetition of the name often enough will somehow cause multiple conspiracies to appear, it is clear the case bears no resemblance to the instant case except for the fact that two of the witnesses in that case, Rossi and Pearson, also testified at this trial.

** Indeed the court and the Government went to great lengths to insure that no multiple conspiracies problems were present in this case. The indictment as returned by the grand jury contained eleven counts and named twelve defendants in the conspiracy count. Following this court's decision on November 10,

[Footnote continued on following page]

Thus, following the commencement of the conspiracy in October or November of 1971 (Tr. 67-72), Rossi and Blase personally received heroin from Ricco and Bragiole on approximately eighteen occasions between October 1971 and July 1972, which they diluted to commercial ounces and sold to customers (Tr. 76-76, 83-84, 89, 95-96, 100, 113), including Corrado (Tr. 94-95, 112). On many occasions, Charles Indiviglia accompanied Ricco and Bragiole when they delivered narcotics to Rossi and Blase (Tr. 102, 110-11), and later to Rossi and Rizzieri (Tr. 144, 156).*

In July of 1972, Rossi and Rizzieri agreed to become partners in the distribution of narcotics (Tr. 128-30)**

1975 in *Bertolotti*, in a letter dated December 8, 1975, the Government consented to the severance of five of the defendants in order to avoid any possible multiple conspiracies problems. The court then severed Anthony Ricco before trial as noted for reasons unrelated to multiple conspiracies concerns. Thus, only the conspiracy count and seven substantive counts, involving five defendants, were submitted to the jury. The jury returned verdicts of guilty as to all defendants on all counts except that Corrado was acquitted on Count Three.

* In March of 1972, Indiviglia personally delivered two ounces of heroin to Rossi and Blase at a seafood restaurant owned by them, while accompanied by Angelo Ricco (Tr. 104-05).

** Although it does not appear that Blase took any affirmative action to terminate his participation in the conspiracy, see *United States* v. *Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965), Rossi himself discontinued his partnership with Blase at the time he became partners with Rizzieri (Tr. 134, 142). Despite the fact that Blase participated in at least eighteen narcotics transactions with the Riccos and Rossi and despite the fact that even after termination of his partnership with Rossi, Blase accompanied Rizzieri and Rossi on at least one occasion when they picked up heroin from Ricco's store (Tr. 892-95), Judge Lasker ruled that in view of "the limited nature of his participation," (Tr. 1551) he would

[Footnote continued on following page]

and when Rossi informed Ricco and Bragiole of this (Tr. 131, 134), they agreed to supply heroin to Rossi and Rizzieri (Tr. 131-35). Rizzieri was told at the outset that the source of the heroin was the Riccos (Tr. 142) and he met them in August of 1972 (Tr. 149, 156). Thereafter he met them on numerous occasions (Tr. 144-58) and together with Rossi received heroin from them personally on forty to fifty occasions between August and December of 1972 in quantities ranging from two kilograms to an eighth of a kilogram (Tr. 1566-58).* Rossi and Rizzieri also received cocaine from the Riccos during this period ** (Tr. 162-70, 173-74).

Rossi and Rizzieri in turn cut the heroin they received from the Riccos and together distributed it to many customers (Tr. 149-52) including John Di Salvo ***

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allow Blase either to continue on trial in this case or to be severed and tried alone (Tr. 1551-52). Blase did in fact elect to be severed (Tr. 1561-62) but on April 22, 1976, he pleaded guilty to the conspiracy count, the only count in which he was charged in the indictment.

* Rossi, Rizzieri, Indiviglia, Ricco and Bragiole also met on many occasions in order to transfer money generated by the sale of narcotics (Tr. 157-62).

** In August of 1972, Rizzieri and Rossi met with Ricco and Indiviglia at the Rosedale Social Club and agreed to buy a kilo of cocaine for $14-16,000 (Tr. 162-65). The next day, Rizzieri and Rossi again met Indiviglia and Ricco and were given the kilo (Tr. 165-70). Count Two charged Ricco and Indiviglia with participation in this transaction and the jury found both defendants guilty. Indiviglia also gave Rossi and Rizzieri cocaine samples on several other occasions (Tr. 173-74).

*** In November of 1972, Rossi and Rizzieri met with John Di Salvo at the Magic Carpet Bar at which time Di Salvo told Rossi and Rizzieri that he had people who wanted to buy an eighth of a kilogram of heroin that could be cut or diluted at least five times (Tr. 175-76). Rossi and Rizzieri agreed to supply him with the heroin (Tr. 176-77) and did so that same day, giving him heroin which they had stored at Rossi's home (Tr. 176, 180). This transaction was the subject of overt act no. 8 of the conspiracy count.

(Tr. 175-77), George Corrado (Tr. 152-54) and Peter Angiolillo (Tr. 150, 179).* Between August and December of 1972, Rossi and Rizzieri purchased approximately fifty pounds of heroin from Bragiole and Ricco, generating approximately $200,000 in cash from the sale of that heroin, of which they paid approximately $150,000 to the Riccos (Tr. 157-58).

In January of 1973,** a change in the conspiracy's composition occurred, when, following a dispute with the Riccos and Rizzieri about responsibility for $56,000 from a heroin transaction which fell through, Rossi terminated his narcotics relationship with the Riccos and Rizzieri (Tr. 212-20). Rizzieri, however, continued to purchase heroin from the Riccos (Tr. 220),*** until he

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* Rossi and Rizzieri also supplied other customers with heroin at this time including Robert Menstrassi (Tr. 134, 148-51), and Frank Giacamelli (Tr. 197-200). While appellants attempt to argue that these transactions show the existence of multiple conspiracies, the evidence at trial was clear that the source of heroin supplied to these people by Rossi and Rizzieri was the Riccos on each and every occasion. Thus, when Rossi and Rizzieri supplied Giacamelli and his associates with two kilograms of high quality heroin, they first met with the Riccos and discussed the transaction, agreed that the price to the customers would be $41,000 a kilo (Tr. 199-200) and ultimately received the heroin from them (Tr. 200-05). Count Five charged Ricco and Rizzieri with participation in this transaction and the jury found them guilty of it.

** In December of 1972, Ricco, Bragiole, Indiviglia, Di Salvo, Corrado and Rizzieri all attended a party at the Magic Carpet held by Rossi after the baptism of his child (Tr. 184-87). Angelo Ricco became the child's godfather (Tr. 181-82).

*** It is of course settled that a conspiracy does not cease to be a single conspiracy merely because of a change in membership. *United States* v. *Stromberg*, 268 F.2d 256, 263-64 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). See *United States* v. *Cirillo*,

[Footnote continued on following page]

was arrested on March 14, 1973 after selling one-quarter kilogram of heroin to Special Agent Ferrarone (Tr. 842-45), which he had gotten from Bragiole (Tr. 867-68).

In December of 1972, Ricco and his business partner, Renzo Baronte,* purchased a one-half interest in the Magic Carpet Bar ** from Peter Mengrone who was in financial difficulty at the time (Tr. 1235-37). Mengrone eventually sold the remainder of his interest in the bar to Ricco (Tr. 1254-55) and in May of 1973, faced with over $25,000 in debts, he met with the Riccos and asked if he could begin working for them in their narcotics distribution operation (Tr. 1256). Bragiole agreed to bring him into the narcotics business (Tr.

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468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Calabro*, 467 F.2d 973, 982-83 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). In this case, the Riccos assisted by Indiviglia remained the ultimate suppliers of narcotics throughout the conspiracy, distributing to Rossi and Blase (October 1971 to August 1972), Rossi and Rizzieri (August 1972 to January 1973), Rizzieri (until his arrest in March 1973) and Mengrone (May 1973 until his arrest in October 1973).

* Ricco and Baronte owned a men's clothing store known as Renzo's Originals, (Tr. 155, 1569) where Rossi, Blase and Rizzieri on occasion received heroin or dropped off money for the Riccos (Tr. 154-55, 892-95).

** The Magic Carpet was a bar on Morris Park Avenue in the Bronx, owned by Peter Mengrone and his cousin Georgiana Kunik. Aside from Rossi's testimony concerning the narcotics discussions and transactions conducted there, Peter Mengrone testified that Ricco, Bragiole, Rizzieri, Di Salvo, Rossi, and Indiviglia frequented the bar between September 1972 and June 1973 (Tr. 1219-29). Mengrone further testified that he saw various combinations of these people furtively enter the bathroom or the kitchen together. Rossi had earlier described how the Riccos had delivered narcotics using bathroom commodes (Tr. 76-78, 86-88).

1256-57) and Mengrone worked for the Riccos,* with limited success,** until his arrest in October of 1973.***

The evidence at trial thus unequivocally demonstrated the existence of a major narcotics distribution conspiracy

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* In September or early October of 1973, Bragiole arranged to give Mengrone a sample of a recent heroin shipment for distribution to a potential customer. While waiting for delivery of this sample at the Magic Carpet, Mengrone spoke with Indiviglia who was also waiting for Bragiole to arrive with one-quarter kilogram of heroin for him (Tr. 1280-82). Bragiole ultimately arrived and gave Mengrone the sample, and then joined Indiviglia inside the Magic Carpet (Tr. 1282-84).

** In June of 1973, Mengrone, the Riccos, Pearson, Di Salvo and Jerry Rubin, were involved in a one kilogram cocaine transaction which failed to materialize when it was realized that a circular transaction had been arranged (Tr. 1258-68). Mengrone was given a sample of the cocaine by Angelo Ricco in the bedroom of the Ricco home (Tr. 1262-63). Pearson also described the participation of Di Salvo and himself in this same transaction, including their meeting Ricco in the Magic Carpet (Tr. 971-81). Count Seven charged the Riccos with participation in this transaction and the jury found Angelo Ricco guilty.

Di Salvo and Pearson had previously sold one-eighth kilogram quantities of heroin to Rubin on two occasions in May of 1973 (Tr. 965-70). Di Salvo obtained the heroin on each of those occasions, and was accompanied by Pearson on the first occasion. At that time, they drove to the vicinity of St. Raymond's Cemetery in the Bronx, exited the car, and returned to find the heroin under the seat (Tr. 967-68). Angelo Ricco lived in precisely that area (Tr. 220-22, 1264). Di Salvo did not tell Pearson his source of supply of the heroin. Pearson also described an incident in October of 1973 in which he gave Angelo Ricco a sample of cocaine in order to see if Ricco was interested in purchasing a quantity thereof (Tr. 985-86).

*** In October of 1973, Mengrone was arrested in the middle of a transaction in which he was to sell three kilos of heroin received from the Riccos to a law enforcement officer for $105,000 (Tr. 1302-15). A number of conversations between Mengrone, the Riccos and others relating to this transaction were recorded and introduced in evidence at trial.

headed by Ricco and Bragiole, which despite some changes in its membership over time, remained a coherent organization that successfully placed massive quantities of heroin "into the hands of the ultimate users," *United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963), with great regularity. Quite unlike *Bertolotti*, where the court found that the transactions "could hardly be attributed to any real organization, even a loose knit one," and that there was no evidence which revealed "what could seriously be called 'a reguar business on a steady basis,'" 529 F.2d at 155, the evidence in this case showed the source of all the narcotics in the transactions described to have been the Riccos, who supplied heroin to their underlings with the regularity of a milkman during the period of the conspiracy.

Ricco argues that "the evidence in this case clearly establishes multiple conspiracies," because "the activities of Rizzieri in selling narcotics to Agent Ferrarone had nothing to do with the conspiracy involving Angelo Ricco" (Brief at 13). It was, however, the unrebutted testimony of Albert Rossi that Rizzieri and he had together received narcotics from the Riccos on forty to fifty occasions (Tr. 156-58) and that Rizzieri continued to do so after January of 1973 when Rossi stopped dealing with him and the Riccos (Tr. 220). This suggested that the Riccos were the source of the narcotics sold by Rizzieri to Agent Ferrarone. Further, Ferrarone himself testified on cross-examination that following Rizzieri's arrest on March 14, 1973, Donovan, who was arrested with Rizzieri, stated that Rizzieri had informed him that he had gotten the heroin involved in that transaction from Ricco's partner, Bragiole * (Tr. 867-68).

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* The claim that this testimony should have been excluded under *Bruton* v. *United States*, 391 U.S. 123 (1968), discussed at Point IV, *infra*, is specious. See also Point VII, *infra*.

Finally, the evidence showed that following his arrest, Rizzieri sent a message to Ricco and Bragiole that "he was going to take the fall himself and not implicate anybody" (Tr. 1251-54). Accordingly, Ricco's claim that Rizzieri's activities "had nothing to do with the conspiracy involving Angelo Ricco" should be rejected out of hand.

Indiviglia also complains of alleged multiple conspiracies arising from the proof relating to Rizzieri's activities. Apparently recognizing the frivolousness of this multiple conspiracies claim, Indiviglia attempts to argue that his role in this sordid series of events was "at a minimum," and accordingly, that his being tried together with the other defendants denied him a fair trial (Brief at 21-28). Yet the unrebutted evidence showed that Indiviglia usually accompanied the Riccos when they arranged to deliver heroin to Rossi and Blase (Tr. 102, 210-11), to Rizzieri and Rossi (Tr. 144, 1555), that he delivered heroin and cocaine for the Riccos (Tr. 104-05, 173-74, 1280-82), and that he himself sold substantial quantities of narcotics with the Riccos, including a kilo of cocaine, which he sold to Rossi and Rizzieri (Tr. 162-70).* It is clear that Indiviglia was deeply involved in the narcotics distribution activities of the

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* Indiviglia's implicit attempt to invoke the single act or isolated transaction doctrine, *United States* v. *DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971), is frivolous. The doctrine is only applicable "when their is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge may be inferred." *United States* v. *Agueci*, *supra*, 310 F.2d at 836. Indiviglia clearly was directly involved in many narcotics transactions both small and large involving the other members of the conspiracy.

Riccos and should not now be heard to complain that his associates threatened and cheated other people in furtherance of their narcotics business, of which Indiviglia was a part.*

Indiviglia seems to contend that somehow the Government failed to show that he agreed to the full range of narcotics distribution activities engaged in by the other members of the conspiracy. The evidence in fact shows Indiviglia to have been privy to many activities and discussions involving Rossi, Rizzieri, Blase, Ricco and Bragiole throughout the period of the conspiracy. Indiviglia's claim, properly stated, would appear to be one of prejudicial misjoinder, a claim which is clearly frivolous on this record. As the court in *United States* v. *Borelli*, 336 F.2d 376, 387 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965), made clear, if there is sufficient evidence linking co-conspirators "in one phase of their criminal enterprise" the joinder requirements of Rule 8 of the Federal Rules of Criminal Procedure are satis-

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* Insofar as any of the parties attempt to dredge up the alleged non-narcotics activities of the defendants in an effort to bring this case within the facts of *Bertolotti*, it must be noted that such testimony was elicited in the Government's direct case *only* insofar as the activity was undertaken *directly* in furtherance of the defendants' narcotics activities, as in the case of Bragiole's threat to kidnap the child of a narcotics dealer to force him to pay $33,000 owed the Riccos in connection with narcotics activities (Tr. 1268-76). *See, United States* v. *Tramunti*, 513 F.2d 1087, 1118 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). Most of this testimony was in fact brought out by appellants' themselves in cross-examining Rossi, Pearson and Mengrone, in an effort to show what evil men they were. (See the cross-examination of Rossi, Tr. 214-713).

fied.* Thus, Indiviglia's claim of multiple conspiracies fails.**

Finally, Rizzieri attempts to conjure up the specter of multiple conspiracies by admitting that the Riccos were "the principal drug source" throughout the period of the conspiracy and that "each of the distributors was a co-conspirator with the Riccos" (Brief at 10), but claims that the distributors were not shown to be co-conspirators with each other. Thus, it is contended, Rossi, Rizzieri, Blase, and Mengrone, the middle-tier distributors between the Riccos and the customers such as Corrado and Di Salvo, merely had a common source of supply but were not co-conspirators. The evidence, however, does not support this claim because Rossi and Blase and later Rossi and Rizzieri were partners with each other, and by explicit agreement with the Riccos, were distributors for them. Thus after Rossi and Rizzieri became partners, Rossi informed the Riccos and secured their explicit agreement to supply Rizzieri and him with large quantities of narcotics. Thereafter, Rizzieri, Rossi and the Riccos met on many occasions, either to deliver money or to obtain narcotics. The fact that Rizzieri did not have as extensive contact with Blase ***

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* The only remaining requirement is then that appropriate instructions be given the jury concerning the question of the scope of the agreement made by a particular defendant. Indiviglia apparently finds no fault with the court's instructions.

** Indiviglia's claim that the principal evidence against him was the testimony of Albert Rossi (Brief at 25) is as irrelevant as it is wrong. Aside from the fact that counsel for Indiviglia joined other counsel in cross-examing Rossi for some two and a half days and five hundred pages of testimony and thus had a full opportunity to explore his credibility, Mengrone also testified to Indiviglia's participation in narcotics transactions with the Riccos (Tr. 1280-82, 1209-50).

*** However, Rossi, Blase and Rizzieri did obtain narcotics together at Ricco's store on one occasion (Tr. 892-95).

or with Mengrone,* merely reflects the fact that the membership did change over time,** not that there was more than one conspiracy.

By attempting to focus on the horizontal relationships between Blase, Rossi, Rizzieri, and Mengrone, Rizzieri ignores the vertical structure which the Government's proof so clearly showed.*** But even beyond the omnipresence of the Riccos at the top of this conspiracy, Rizzieri ignores critical evidence linking these middle-tier distributors throughout the conspiracy in arguing that "the distributors each dealt with the Riccos, but they were not otherwise linked with each other" (Brief at 13). Aside from the obvious link between the distributors, namely Albert Rossi himself, Blase was in Puerto Rico with Rossi when the latter was introduced to Rizzieri. Even after Blase and Rossi terminated their partnership and Rizzieri became partners with Rossi and the Riccos, Blase accompanied Rossi and Rizzieri when they picked up heroin at Ricco's store (Tr. 892-95). Later, when Rizzieri continued to deal with the Riccos even after Rossi withdrew, he used Mengrone to relay a message to the Riccos about his arrest and his intention not to divulge the Riccos as his source of narcotics. Shortly thereafter, Mengrone was brought into the narcotics operation as well. Accordingly, Rizzieri ignores sub-

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* Following his arrest, however, Rizzieri did send a message about his narcotics activities to the Riccos through Mengrone (Tr. 1251-54).

** Thus Rizzieri joined the Riccos and Rossi when Blase and Rossi terminated their partnership, while Mengrone did not become directly involved with the Riccos' narcotics business until two months after Rizzieri's arrest in March of 1973.

*** Thus, Rizzieri not only got heroin directly from the Riccos on many occasions but personally delivered it to co-conspirator Corrado many times (Tr. 152).

stantial lateral linkage among the co-conspirators over time, aside from the strong vertical connection with the Riccos.*

Finally, it is clear that when large quantities of heroin are being distributed, multiple conspiracies do not result merely because the central source sells to a number of distributors over time. As this court recently observed in *United States* v. *Leong*, *supra*, in affirming the convictions of a principal supplier (Olsen), a San Francisco distributor (Wong) and a customer of the New York distributor (Leong):

> "Even though Wong and Leong may not have known the identity of some of suppliers, and even some of the distributors, it is reasonable to infer that each knew that his supply was only a part of the overall quantity of narcotics which had been imported . . ."

See *Blumenthal* v. *United States*, 332 U.S. 539, 545-55 n.14 (1947); *United States* v. *Ortega-Alverez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Untied States* v. *Calabro*, 467 F.2d 973, 982-83 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States*

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* Rizzieri makes much ado over the fact that he obtained drugs from persons other than the Riccos, such as Cimino and Castellano (Tr. 848) when he couldn't get drugs from the Riccos, and that Rossi and Di Salvo were "major dealers in their own right," during their relationship with the Riccos. Aside from the fact that these other relationships were brought out principally on cross-examination by defense counsel, it is clear that if a single conspiracy is alleged and proved, the fact that other conspiracies may also exist is immaterial. *United States* v. *Tramunti*, 513 F.2d 1087, 1106 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

v. *Arroyo*, 494 F.2d 1316, 1319 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974).*

In sum, the evidence in this case clearly showed not some far-flung, disjointed, and haphazard operation in which some members of the conspiracy were unknown to and unseen by other members, but rather a tightly-knit organization in which virtually all the members thereof were known to and dealt with one another on a very regular basis.** *See United States* v. *Ortega-Alvarez*, *supra*, 506 F.2d at 457; *United States* v. *Arroyo*, *supra*, 494 F.2d at 1319; *United States* v. *Bynum*, 485 F.2d 490 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 9003 (1974); *United States* v. *Agueci*, *supra*, 310 F.2d 817.*** Indeed, this Court has found a

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* As the court observed in *Arroyo*, in rejecting a claim that multiple conspiracies were shown, "especially where heroin is involved . . . it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy." 494 F.2d at 1319.

** The court gave comprehensive instructions on the law of multiple conspiracies, to which no objection was taken either at trial or on appeal (Tr. 2229-30, 2233-35).

*** Even assuming, *arguendo*, that multiple conspiracies were proven rather than the single conspiracy charged in the indictment, appellants have failed to, and indeed cannot, show that they were "substantially prejudiced" thereby. *United States* v. *Miley*, 513 F.2d 1191, 1207 (2d Cir. 1975). Ricco, Indiviglia, and Rizzieri claim prejudice in that the proof against one set of conspirators had a spill-over effect on the others that would not have resulted had there been separate trials. This was not, however, a case in which minor participants were joined with major violators so that there was a risk the former were swept away in the tide of evidence against the latter. The jury apparently had no difficulty in sifting the evidence with respect to each defendant and in fact acquitted Corrado on one of the two counts in which he was charged. See *United States* v. *Papadakis*, 510 F.2d 287, 300-301 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). The proof showed that all three appellants were major distributors of heroin supplying or receiving heroin on countless occasions over a substantial period of time.

single conspiracy in cases with far less compelling fact patterns than those here. *E.g., United States* v. *Tramunti*, 513 F.2d 1067 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Mallah*, *supra*.*

POINT II

The trial court's denial of Ricco's motion for severance was proper.

Ricco claims that the trial court abused its discretion in denying his motion for a severance made during trial on the grounds that the defenses of Rizzieri and Ricco were so antagonistic as to deprive the latter of a fair trial. Ricco's argument is, however, premised upon a fundamental misreading of the record and is wrong as a matter of law.

Rizzieri was named in Count One, the conspiracy count, Count Four, which charged Ricco, Rizzieri and

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* It is not the task of this court on appeal to review all the evidence and determine *de novo* whether a single or multiple conspiracies exist, but to determine (1) whether there was sufficient evidence from which the jury could find the existence of the single conspiracy charged, and (2) whether the trial court properly instructed the jury with respect to the law of single or multiple conspiracies. *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied sub nom, Scardino* v. *United States*, 44 U.S.L.W. 3624 (May 3, 1976); *United States* v. *Torres*, 519 F.2d 723 (2d Cir. 1975).

If the court properly instructed the jury, the sole question becomes one of the sufficiency of the evidence to sustain the jury's finding of a single conspiracy. *United States* v. *Calabro*, *supra*, 449 F.2d at 893; *Dardi* v. *United States*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). The fact that there is evidence from which a jury *could* find multiple conspiracies to exist is irrelevant if there is evidence from which they could find the existence of the conspiracy charged.

Bragiole with distributing approximately 461.9 grams of heroin on or about November 22, 1972, and Count Five, which charged the same three defendants with distributing approximately two kilograms of heroin in or about November or December, 1972.

At trial, the Government called Special Agent Donald Ferrarone who testified that while acting in an undercover capacity, he purchased 461.9 grams of heroin from Peter Angiolillo, a/k/a "Pete the Weep," in the presence of Rizzieri on November 22, 1972, the transaction charged in Count Four of the indictment.* Ferrarone also testified to two subsequent direct purchases of heroin by him from Rizzieri in February and March of 1973** (Tr. 842-56, 865-70). In addition, the Government proved through the testimony of Albert Rossi that the source of the heroin which Rizzieri sold in the two transactions charged in Counts Four and Five, as well as the heroin involved in the two subsequent transactions, was the Riccos (Tr. 124-58, 200-05, 867-69). Rizzieri's defense consisted of (1) denying, through counsel, any

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* An analysis of the proof establishing that Rizzieri participated in this sale is discussed in Point VI, *infra*.

** Agent Ferrarone testified that on February 8, 1973, he was introduced to Rizzieri by Peter Angiolillo, then acting as a government informant, at which time Ferrarone purchased an eighth of a kilogram of heroin from Rizzieri for $3600.

Ferrarone further testified that he negotiated for and on March 14, 1973, received from Rizzieri a quarter kilogram of heroin, at which time he placed Rizzieri under arrest.

Rizzieri was not charged with either of these transactions in this indictment but did plead guilty in the Eastern District of New York in 1973 to one count charging him with participation in the March 14th distribution. See Point VI, *infra*.

participation in the November and December transactions charged in Counts Four and Five, and (2) tacitly conceding his participation in the February and March transactions but denying membership in the conspiracy charged in Count One by claiming that his source of heroin on those occasions was not the Riccos (Tr. 2002-33). Rizzieri called no witnesses and did not testify.

Ricco, who was charged with conspiracy to distribute narcotics and with five counts charging actual distributions, namely Counts Two, Four, Five, Seven, and Eleven, called two witnesses in his defense in an effort to impeach the testimony of Albert Rossi and Peter Mengrone, both of whom had given testimony damaging implicating Ricco in the narcotics activities of which he now stands convicted. Ricco too did not testify himself. Basically, Ricco's defense consisted of denying, through counsel, that he was involved in any of the narcotics activities with which he was charged (Tr. 1926-99).

It is settled that the grant or denial of a motion for severance under Rule 14 of the Federal Rules of Criminal Procedure is within the sound discretion of the trial court, *Opper* v. *United States*, 348 U.S. 84 (1954); *United States* v. *Bernstein*, 533 F.2d 775, 789 (2d Cir. 1976); *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972), and that denial of a motion for severance will be reversed only upon a clear showing that there has been an abuse of that discretion. *United States* v. *Turcotte*, 515 F.2d 145, 150 (2d Cir. 1975), *cert. denied sub nom. Gerry* v. *United States*, 423 U.S. 1032 (1976); *United States* v. *Jenkins*, 496 F.2d 57, 67-68 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). Furthermore, an abuse of discretion may be found only if the joint trial was "manifestly prejudicial", *United States* v. *Berlin*, 472 F.2d 13, 15 (9th Cir. 1973), or if the trial resulted in "sub-

stantial prejudice" to a defendant's fundamental right to a fair trial. *United States* v. *Morgan*, 394 F.2d 973, 978 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968); *United States* v. *King*, 49 F.R.D. 51, 53 (S.D.N.Y. 1970); *United States* v. *Fassoulis*, 49 F.R.D. 43, 44-45 (S.D.N.Y. 1969), *aff'd*, 445 F.2d 13 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971), and the burden of so demonstrating which rests upon the appellant, has been described as a difficult one, *United States* v. *Finkelstein*, 526 F.2d 517, 525 (2d Cir. 1975), *cert. denied sub nom. Scardino* v. *United States*, 44 U.S.L.W. 3624 (May 3, 1976); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).*

In the instant case, it is clear that the trial court did not abuse its discretion in denying Ricco's severance motion and that there was in fact no conflict between the defenses raised by Rizzieri and Ricco. As noted, Rizzieri and Ricco both denied any involvement in the two transactions in which they were named jointly, the November 22, 1972 transaction charged in Count Four and the December 1972 transaction charged in Count Five. While Rizzieri did ultimately concede through counsel his involvement in the February and March, 1973 transactions, neither of which he was charged with in this indictment, he denied that his source of supply in either transaction was the Riccos. Thus while Rizzieri may have tacitly conceded his involvement in a narcotics distribution conspiracy, since he obviously did not manufacture these narcotics himself, he denied participation

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* In exercising its discretion, the trial court must, of course, take into consideration the time, burden and expense which separate trials would entail, particularly in a lengthy conspiracy case such as the instant one. *United States* v. *Finkelstein*, *supra*. *United States* v. *Wallace*, 272 F. Supp. 838 (S.D.N.Y. 1967); *United States* v. *Verra*, 203 F. Supp. 87 (S.D.N.Y. 1962).

in the conspiracy charged in the indictment and indeed in any conspiracy involving the Riccos. Accordingly, the basic defenses of Ricco and Rizzieri were in no sense antagonistic.*

Ricco, however, attempts to generate a conflict based upon the court's admission of certain testimony from Ferrarone. Consistent with Rizzieri's denial of membership in any conspiracy with Ricco, as charged in Count One, counsel for Rizzieri attempted to establish during cross-examination that Rizzieri's source for narcotics involved in the March 14th transaction was someone other than the Riccos. To that end, he asked Ferrarone whether Rizzieri's companion, Peter Donovan, had told Ferrarone about the source of the narcotics seized from Rizzieri that day. Counsel for Ricco, apparently anticipating that Ferrarone would testify that Donovan had in fact identified Rizzieri's source as someone other than the Riccos, failed to raise any objection to this line of inquiry whatsoever (Tr. 865-68). It was only when Ferrarone testified that Donovan identified Rizzieri's source as Bragiole (Anthony Ricco) that counsel for Angelo Ricco offered

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* Ricco argues that Rizzieri's admission of participation in narcotics activities was so prejudicial to Ricco, who denied any involvement at all, as to require severance. Aside from the fact that Judge Lasker properly charged the jury that guilt was personal and not to be inferred from mere association (Tr. 2218-19, 2230-38), the logical consequence of Ricco's argument would be that no two defendants in a narcotics conspiracy case could be tried together where one of them had a prior narcotics conviction which he admitted. The law is clear that a severance should not be granted merely because a defendant claims he will be prejudiced by being associated with a co-defendant at trial. *United States* v. *Myers*, 406 F.2d 746, 747 (4th Cir. 1969); *United States* v. *Crisona*, 271 F. Supp. 150, 155 (S.D.N.Y. 1967)

any objection whatsoever to this line of inquiry.* Having thus sought to buttress Ricco's denial of participation in the conspiracy charged in Count One, which included Rizzieri, by permitting Rizzieri's counsel to elicit testimony showing Rizzieri's source of narcotics to be other than Ricco, Ricco should not now be heard to complain that this tactic proved ill-founded since the testimony, in fact, showed Rizzieri's source to be Bragiole, appellant's uncle and partner.

Moreover, this testimony in no sense generated a conflict between the defenses of Ricco and Rizzieri.** Rather,

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* To read appellant's brief, one might conclude that this line of inquiry was permitted over the vigorous objections of Ricco's counsel. In fact, counsel for Rizzieri had previously indicated in the robing room his intention to inquire of Ferrarone about Rizzieri's source (Tr. 762-63). Thereafter, no objection whatsoever was raised by counsel for Ricco when Ferrarone was asked by Rizzieri's counsel about the source of these narcotics (Tr. 865-68). Initially, Ferrarone did in fact testify that Donovan informed him that Rizzieri had previously gotten drugs from Jimmy Cimino and Eddy Castellano among others (Tr. 866-67). When Ferrarone was asked directly whether Donovan told him that Rizzieri got the drugs involved in the March 14th transaction from Bragiole, counsel for Angelo Ricco did not object, and Ferrarone answered affirmatively (Tr. 867-68). Obviously surprised by this answer, counsel asked the question again directing Ferrarone's attention to the drugs involved in the March 14th transaction, and Ferrarone again responded affirmatively (Tr. 868). Only after the court itself then asked two questions did counsel for Ricco object to this testimony (Tr. 868). The propriety of the court's decision overruling that objection is discussed at Point IV, *infra*.

** Ricco's claim of prejudice is even less substantial when the record is read accurately. Contrary to appellant's assertions, Ferrarone testified that Donovan told him that Rizzieri identified *Anthony* Ricco, and *not* Angelo Ricco, as the supplier of the heroin (Tr. 868). Appellant thus seriously mistakes the record on this point. As noted, Anthony Ricco, a/k/a "Tony Bragiole" was severed from this case and was not on trial with Angelo Ricco.

it was equally damaging to both insofar as it tended to show that Rizzieri had in fact participated in a conspiracy to distribute narcotics which other evidence showed included within its membership the two Riccos. Appellant Ricco's statement that "It was, on the other hand, beneficial to Rizzieri's defense that the two sales conceded to have occurred be identified by the source of supply," (Brief at 11) must be qualified by the recognition that, as in Ricco's case, it was only beneficial to identify the source of supply if that source was other than the Riccos. Essentially, Ricco now complains of little more than a mistake in trial strategy.*

Even were there found to arise some minor conflict between the defenses of Ricco and Rizzieri, it is clear that a severance should not be granted merely because conflicting defenses are offered, in the absence of a showing of substantial prejudice undermining the fairness of the trial. *United States* v. *Perez*, 489 F.2d 51, 68 (5th Cir. 1973), *cert. denied*, 417 F.2d 945 (1974); *United States* v. *Bentvena*, 319 F.2d 916, 944 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States* v. *Cohen*, 124 F.2d 164 (2d Cir.), *cert. denied sub nom. Bernstein* v. *United States*, 315 U.S. 811 (1941); *United States* v. *Kahaner*, 203 F. Supp. 78, 81-82 (S.D.N.Y. 1962), *aff'd* 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).** It is apparent in this case that the defenses

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* Ricco's flawed reading of *Bruton* v. *United States*, 391 U.S. 123 (1968), is discussed at Point IV, *infra*.

** It is noteworthy that neither Ricco nor Rizzieri testified at trial. Ricco's reliance upon *United States* v. *De Luna*, 308 F.2d 140 (5th Cir. 1962) and *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974), is misplaced. In *De Luna*, the court reversed one defendant's conviction because of his co-defendant's commentary on his failure to testify after calling him as a witness and thus prompting the latter to invoke

[Footnote continued on following page]

of the parties were not such as to deprive Ricco of a fair trial nor even to prejudice him.* Accordingly, Judge Lasker's denial of Ricco's severance motion was correct.

POINT III

The District Court did not err in denying Ricco's motion to dismiss the indictment because of the use of leading questions in the grand jury.

Ricco contends that the use by the prosecution of leading questions in its examination of various witnesses before the grand jury rendered the indictment invalid and accordingly, that Judge Lasker erred in refusing to dismiss the indictment (Ricco Brief at 16). The claim is frivolous and should be rejected out of hand.

While the prosecution made extensive use of leading questions in its examination of a number of grand jury witnesses, it was entirely proper for it to do so. The limitations imposed by Rule 611(c) of the Federal Rules of Evidence on the use of leading questions during direct examination at trial are, under Rule 1101(d)(2) of

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his Fifth Amendment privilege. The dicta on severance upon which appellant undoubtedly relies has been rejected by Judge Weinfeld in *United States* v. *Marquez*, 319 F. Supp. 1016, 1019-23 (S.D.N.Y. 1970), *aff'd*, 449 F.2d 89, 93 (2d Cir. 1971), *cert. denied*, 405 U.S. 963 (1972).

In *Barrera*, counsel for one defendant actually conceded his client's participation in the conspiracy charged but raised insanity as a defense. Even so, the Court held that severance was properly denied. Rizzieri claimed membership in some other conspiracy in order to negate participation in the conspiracy charged.

* It is perhaps in recognition of this fact that even after Judge Lasker invited counsel for Ricco to submit an instruction concerning antagonistic defenses, he failed to do so (Tr. 2089-90).

those same Rules, explicitly made inapplicable to grand jury proceedings. Indeed, the inapplicability of the Rules of Evidence to grand jury proceedings, which are, of course, *ex parte* in character, is simply an incident of the wide latitude historically accorded grand jury investigations, *In Re Millow*, 529 F.2d 770, 774 (2d Cir. 1976), and of the well settled rule that an indictment, if valid on its face, is enough to call for a trial on the merits. *Costello* v. *United States*, 350 U.S. 359 (1956). Accordingly, a grand jury may rely on hearsay or otherwise incompetent evidence, where the nature of the evidence is revealed to the grand jurors, *id*; and it may even ask questions based on evidence obtained in violation of the Constitution. *United States* v. *Calandra*, 414 U.S. 338, 349-52 (1974) (Fourth Amendment); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966) (Fifth Amendment).

Ricco fails to allege any prejudice or indeed anything improper about the use of leading questions in the grand jury. A witness thus examined is free to affirm or deny the truth of any question put to him and can be cross-examined concerning the responses in the grand jury when the case is brought to trial. Noteworthy in this respect is the fact that Ricco does not attack the substance of any of the grand jury testimony inculpating him.*

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* The only authority cited by appellant for this bold proposition is *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972). While *Estepa* supports the proposition that an appellate court may, in the exercise of its supervisory powers, dismiss an indictment, the case itself involved a very different issue from that raised herein, namely the requirement that the prosecutor inform the grand jury that the witness testifying before it was not an actual eye-witness to the event being described but rather is giving

[Footnote continued on following page]

Finally, it is settled that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence," *United States* v. *Calandra*, *supra* at 345; *Costello* v. *United States*, *supra*; *Holt* v. *United States*, 218 U.S. 245 (1910), except in very exceptional circumstances, which are not present here.

POINT IV

Ricco was not denied his rights under *Bruton* v. *United States*.

Ricco contends that the admission into evidence of post-arrest statements by co-defendant Rizzieri through the testimony of Agent Ferrarone was a violation of the principles of *Bruton* v. *United States*, 391 U.S. 123 (1968), and warrants reversal. He bases his *Bruton* claim on the assertion that Ferrarone testified on cross-examination by counsel for Rizzieri that subsequent to Rizzieri's arrest, Rizzieri told Ferrarone that the heroin which Rizzieri sold to Ferrarone came from Bragiole and Ricco (Br. at 11, 17-18). Ricco is mistaken as to the facts.

Ferrarone's testimony, elicited on cross-examination by counsel for Rizzieri, was that subsequent to Rizzieri's arrest on March 14, 1973, Donovan, who was arrested with Rizzieri, but was not a defendant in the indictment being tried, told Ferrarone that Rizzieri had told Donovan that Rizzieri received the heroin which was

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hearsay evidence, so that the grand jury is in a position to assess the value of the evidence. It is, of course, settled that an indictment based solely on hearsay evidence is valid, *Costello* v. *United States*, 350 U.S. 359 (1956). When leading questions are put to a grand jury witness, the grand jurors, of course, have a full opportunity to assess the value of the responses.

seized from Rizzieri on March 14, 1973, from Bragiole (Tr. 966-69). Contrary to the assertion by Ricco, Ferrarone never testified at any time that Rizzieri made post-arrest statements to him. Furthermore, Ferrarone, again contrary to Ricco's claim, never testified that he was told the heroin came from Bragiole *and* Ricco. He testified that Donovan told him that Rizzieri had said that the heroin came from Bragiole. Ricco was not mentioned and, therefore, not even implicated. *See*, *United States* v. *Wingate*, 520 F.2d 309, 313-14 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States* v. *Gerry*, 515 F.2d 130, 142 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *Tasby* v. *United States*, 451 F.2d 394, 397-98 (8th Cir. 1971), *cert. denied*, 405 U.S. 992, 406 U.S. 922 (1972). *Bruton* held only that under certain circumstances the admission of a co-defendant's post-conspiracy confession, which implicates the defendant violates the Confrontation Clause where the co-defendant does not testify. Here, there was neither testimony that the co-defendant, Rizzieri, made post-arrest statements to anyone, nor a statement implicating Ricco. The challenged statement came from Donovan, who was arrested with Rizzieri and who was subject to subpoena as a witness. *Bruton* thus has no application to these facts. Perhaps for this reason, no such grounds for objection were offered by Ricco at trial, which precludes him from even raising such a claim on this appeal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

The only possible objection to Ferrarone's testimony is one based on simple hearsay; that is, Ferrarone should not have been permitted to testify to what Donovan told him. The objection was waived below when it was not raised in a timely fashion. *See*, e.g., *United States* v. *Mayes*, 512 F.2d 637, 653 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975); *United States* v. *Parnes*, 210 F.2d 141, 143 (2d Cir. 1954); *Marx* v. *United States*, 86

F.2d 245, 251 (8th Cir. 1936).* In any event, it is clear that the admission of such testimony did not affect any substantial rights of Ricco. Fed. R. Crim. Proc. 52(a).**

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* Counsel for Rizzieri asked Ferrarone on cross-examination a series of questions with respect to what Donovan told Ferrarone after the arrests of Rizzieri and Donovan on March 14, 1973. No objection was taken by Ricco while these questions were propounded. (Tr. 866-68). Ferrarone testified that Donovan informed him that Rizzieri got drugs from two persons known as Jimmy Cimino and Eddy Castellano, in addition to others (Tr. 866-67). When Ferrarone was asked whether Donovan told him that Rizzieri got the heroin from Bragiole, Ferrarone answered affirmatively (Tr. 867-68). When the question was asked again, Ferrarone again answered affirmatively (Tr. 868). It was only after this testimony had come into the record that counsel for Ricco objected and moved to strike the testimony as hearsay (Tr. 868). The Government opposed the motion to strike based on the fact that when the series of questions were asked there was no objection. The court denied the motion to strike and its decision in this context—one in which there was no hearsay objection until after the testimony came into the record and where it was obvious that counsel for Ricco failed to object initially because of trial strategy pursuant to which both he and counsel for Rizzieri were seeking to show that Ricco and Bragiole were not the suppliers to Rizzieri—was correct. "Counsel could not be permitted to sit idly by and permit the witnesses to testify, possibly hoping that his client might benefit thereby, and then, finding that the testimony was not beneficial, move to strike it out. Such a practice cannot be tolerated." *Marx* v. *United States*, 86 F.2d 245, 251 (8th Cir. 1936). Indeed, in a robing room conference long before the challenged testimony, counsel for Rizzieri informed the court and all counsel that he was going to elicit from Ferrarone on cross-examination that Ferrarone was told that Rizzieri received the drugs from sources other than Ricco and Bragiole (Tr. 762-63).

** In an affidavit, dated July 23, 1976, filed with this court, Ricco's appellate attorney has corrected several of the misstatements in his brief with respect to Ferrarone's testimony. Counsel's insistence, however, that the "corrections do not affect the substance of [Ricco's] brief in any way" is wrong for the corrections clearly distinguish the facts from *Bruton* upon which Ricco relied entirely in presenting his argument that Ferrarone's testimony on cross-examination requires reversal of his conviction.

POINT V

The Government's summation was proper.

Indiviglia and Ricco contend that the Government's summation to the jury was improper in several respects and requires reversal. This claim is meritless.

First, Indiviglia complains about the following remarks, now inserted in their proper context, made by the Assistant United States Attorney in the Government's rebuttal summation:

> "There was a lot said about the money that has been given to Rossi and Pearson, and if any was given to Mengrone—I don't believe there was any proof of that with respect to the record—but of course Rossi and Mengrone are both on the Witness Protection Program and, as such, they were getting money from the United States marshals at that time, and we submit, members of the jury, there is no question, we concede money was paid to these people. We say, members of the jury, that they couldn't have gotten the money from their old associates any longer, somebody has to support these people while they are doing this work. We will make no bones about it. We will do it because we need the testimony because they are the people who know, and that's why we do it; otherwise we couldn't put these cases together.
>
> I submit that every penny we spent on Rossi and on Pearson is worth it, just like—" (Tr. 2196-97).

These remarks were not made in a vacuum as Indiviglia suggests but in direct reply to unsubstantiated allegations in summations by counsel for Ricco and Indiviglia to the effect that the Government had bribed its

witnesses to get their testimony and that the Witness Protection Program, the source of the funds paid to two Government witnesses, was soon to become the next great governmental scandal.* In view of these attacks upon the Government and the Witness Protection Program, the Government's reply was well within the limits of fair response. See *United States* v. *Wilner*, 523 F.2d 68, 73-74 (2d Cir. 1975); *United States* v. *Canniff*, 521 F.2d 565, 571 (2d Cir. 1975), *cert. denied sub nom. Benigno* v. *United States*, 423 U.S. 1059 (1976); *United States* v. *Tramunti*, 513 F.2d 1087, 1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *De Angelis*, 490 F.2d 1004, 1010-12 (concurring opinion) (2d Cir.), *cert. denied*, 416 U.S. 956 (1974).

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* Counsel for Ricco made these remarks to the jury:

"I wonder what would happen to me if I paid my witnesses? I would be seated over there in one of the defendant's seats pretty darn quick, paying your witnesses before they testify. This is not for their testimony, their information, you understand, this is just to get them through so they can live on a daily basis." (Tr. 1956-57).

Counsel for Indiviglia made these remarks to the jury:

"This witness protection is new, and if it isn't today, it's fast becoming the next major scandal you hear about, taking hoodlums, changing their names and shipping them out to other states . . .

Witnesses like Rossi are not new, but this witness protection program is the next scandal, giving him a new name, foisting him out on some people in California. It's now batting back on the Government.

We are not here to talk about things outside this case. I will not do that. You may not consider outside influences, but Rossi is not new, but this witness protection thing is. It's not really important here. (Tr. 2041).

* * * *

In this witness program, one guy they gave a new name. They said he was a retired sergeant. He wanted to be a retired colonel and he sued the Government. They are talking about hundreds of thousands of dollars to rechange his background because he didn't want to be an enlisted man; this criminal wanted to be a retired army officer as a background." (Tr. 2055).

In any event, immediately after these challenged remarks, the court instructed the jury to disregard them and that it was the sole judge of the credibility of the witnesses (Tr. 2197-98). It is difficult to see how the prosecutor's remarks could have prejudiced appellants in the slightest.

Secondly, Ricco claims that remarks by the Government to the effect that if its accomplice witnesses perjured themselves on the witness stand, their agreements with the Government would be void and they would be subject to indictment for perjury and other crimes were unsupported by the record and amounted to the Government's vouching for the credibility of its witnesses.

Contrary to Ricco's contention, there was direct proof in the record that the Government's accomplice witnesses —Rossi, Mengrone and Pearson—would be subject to indictment for perjury and other crimes if it were shown that they had committed perjury on the witness stand (Tr. 582, 719, 948, 1478-81; GX 3503(b)).* The prosecutor's remarks with respect to this matter were made in the context of an analysis of the witnesses' state of mind and in support of the proposition that their motive was to tell the truth rather than fabricate their testimony.** At no time did the prosecutor tell the jury

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* There is no claim here, as there was none below, that this testimony was improperly admitted into evidence.

** This becomes clear when the remarks are placed in their proper context from which they have been wrenched by Ricco:

> "Mr. Amorosa: I talked to you earlier about reasons, members of the jury and now I propose to submit some reasons why these witnesses were telling the truth in this courtroom, why they didn't get together prior to trial to frame these defendants and why these defendants are what these witnesses said they were, and I submit that any one of these reasons, members of the jury, would compel a

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that he knew or the Government knew that the witnesses were telling the truth.* On the contrary, the prosecutor

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finding that these defendants are in fact guilty of these charges, as charged in this indictment.

These witnesses have no motive to lie in this courtroom, members of the jury. Defense will say they are lying to gain an advantage from the Government, but they can't gain anything more by lying, members of the jury, than they can by telling the truth. The truth is the easiest thing to tell. You don't have to worry about getting caught in lies when you tell the truth, when you testify under oath. There is no risk in telling the truth. These witnesses know that if they are caught in a lie, the whole world will come tumbling down on them.

Rossi, Mengrone and Pearson, they will be vigorously prosecuted for each and every narcotics offense to which they have admitted, in addition to being prosecuted for perjury in this courtroom if they lie." (Tr. 1864).

* Indiviglia's counsel recognized this during his remarks to the jury:

"What can you do with Rossi? The law will permit you and you alone to do any one of three things: You can reject him out of hand. 'I don't believe him. I don't care what he said. I just don't believe him.' You are authorized to do that.

I think it's an extreme position, because actually the defendants want you to believe him when he says he robs people and beats them up, so it's not reasonable to expect you to take that kind of an extreme position.

The other extreme position is what the Government says, 'Believe him. Believe everything he said. You are citizens. We are the Government. We tell you you should believe him and since you are part of the Government, we expect you to believe everything when we put a witness on and you should believe everybody we put on the witness stand. You are part of the United States; therefore we instruct you to believe everything Rossi says.'

Again, you are authorized by law to do that. Again, *it's an extreme position, and again, it's unreasonable, because even the prosecutor says he doesn't even take that position.* 'Look for corroboration.'" (Tr. 2042). (Emphasis added).

specifically informed the jury that the case should be decided only upon the proof and nothing else (Tr. 2202-03). This, of course, was repeated several times by the court (Tr. 1823, 2218-20, 2225, 2248).

Finally, in light of the repeated attacks by the defense on the credibility of the accomplice witnesses during the trial and in summations to the effect that the witnesses had a motive to testify falsely, the challenged remarks were certainly proper. *See, e.g., United States* v. *Aloi*, 511 F.2d 585, 597-98 (2d Cir.), *cert. denied*, 423 U.S 1015 (1975); *United States* v. *Koss*, 506 F.2d 1103, 1112-13 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *United States* v. *Isaacs*, 493 F.2d 1124, 1164-65 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Cf. United States* v. *De Angelis*, *supra*, 490 F.2d at 1007-08. In any event, remarks which consisted of only a few sentences out of a total of 133 pages of the Government's summation and after a three week trial, when considered against the background of repeated admonitions by the court to the jury that it was to consider only the proof adduced in reaching a verdict and that the credibility of the witnesses was its decision alone, could hardly have produced even a minimal impact upon the jury. *Cf. United States* v. *Lawn*, 355 U.S. 339, 359 n. 15 (1958); *United States* v. *Socony-Vacuum Oil Corp.*, 310 U.S. 150, 239-43 (1940); *United States* v. *Wilner*, *supra*, 523 F.2d at 73-74 (2d Cir. 1975).

Ricco's last contention is that the prosecutor argued to the jury that "they should convict to prevent drug trafficking." (Br. at 19). No such argument was made. The prosecution closed its first summation to the jury with these remarks:

> "We ask you to determine from the proof in this case, though, that these people were not alone in what they were doing, that by necessity there

> are others involved; the people who shared the profits with them were involved, the people in this courtroom right now. And just as, members of the jury, these defendants shared the profits with the degenerates Rossi, Pearson and Mengrone, we ask you to find that they should also share the responsibility of those people, and that is what this case is about, responsibility to the laws of our country to stop this activity in the future." (Tr. 1920).

The only reference to deterrence in these remarks was limited to the last phrase.* As such it stated the obvious; that a lawful conviction will have a deterrent effect upon others who have not yet made up their minds as to whether to engage in unlawful activity. At most, this had the effect of emphasizing the importance of the case. *United States* v. *Ramus*, 268 F.2d 878, 880 (2d Cir. 1959). When viewed in the context of the entire summation, the challenged remarks did not exceed the bounds of proper comment. *United States* v. *Wilner*, *supra*, 523 F.2d at 73; *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir.), *cert. denied*, 414 U.S. 874 (1973); *United States* v. *La Sorsa*, 480 F.2d 522 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *Di Carlo* v. *United States*, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1924).

Moreover, the court specifically instructed the jury during summations and in its charge that they were not to be concerned with the fact that the case involved narcotics and that the sole basis upon which they should determine the issues was the facts (Tr. 1823, 2216-20, 2225, 2248). *See United States* v. *Wingate*, 520 F.2d 309, 316-17 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074

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* Although objection was voiced as to this short phrase, no motion for a mistrial was made (Tr. 1921).

(1976); *United States*, v. *Canniff*, 521 F.2d 565, 571-72 (2d Cir. 1975), *cert. denied sub nom. Benigno* v. *United States*, 423 U.S. 1059 (1976).

POINT VI

The Government did not impermissibly delay Rizzieri's indictment and did not place him twice in jeopardy for the same offense.

Relying on *United States* v. *Marion*, 414 U.S. 307 (1971), Rizzieri contends that the Government delayed his indictment for over two years after it had developed its case to obtain a tactical advantage over him. He bases this claim on the alleged fact that the Government was aware of Rizzieri's total involvement in this narcotics conspiracy in March, 1973 after Special Agent Ferrarone, who testified for the Government, had negotiated and purchased heroin from him. His argument ignores the record and is frivolous. The delay about which Rizzieri complains was attributable solely to legitimate law enforcement considerations and did not prejudice him in the least.

Ferrarone testified to three narcotics transactions involving Rizzieri in late 1972 and early 1973 upon which Rizzieri now relies.

On November 22, 1972, Rizzieri was present with Peter Angiolillo a/k/a "Pete the Weep," when Angiolillo gave Ferrarone 461.9 grams of heroin in return for $18,000 in cash. Ferrarone was neither introduced to Rizzieri at this time nor heard Rizzieri say anything during this transaction (Tr. 827-31).*

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* Rizzieri, along with Ricco and Bragiole was charged in the indictment with this distribution. Both he and Ricco were convicted of it.

On February 8, 1973, Ferrarone was introduced to Rizzieri, negotiated with him and later that day purchased a quantity of heroin from him for $3,600 (Tr. 842-45).*

On March 14, 1973, after arranging to buy additional heroin from Rizzieri, Ferrarone arrested Rizzieri immediately after Rizzieri handed him a package of heroin (Tr. 847-52).**

The present indictment, filed on April 23, 1975, charged Rizzieri in three counts. He was convicted on all three. Count One charged him with conspiring with Rossi, Bragiole, Ricco and others to distribute narcotics. With respect to this count, Rossi testified that from approximately July, 1972, through December, 1972, he and Rizzieri obtained heroin on numerous occasions from Ricco and Bragiole and re-sold these narcotics—approximately fifty pounds of heroin—to their own narcotics customers, one of them being Peter Angiolillo (Tr. 124-58). Contrary to Rizzieri's claim, none of these many narcotics transactions, as is apparent from the trial record, could have been proven against him until Rossi began to cooperate with the Government, in April of 1974 (Tr. 49).

Count Five of the Indictment charged Rizzieri, along with Ricco and Bragiole, with distribution and possession with intent to distribute of approximately two kilos of heroin in or about November or December 1972. Again, the proof against Rizzieri on this count emanated exclusively from the testimony of Rossi, who testified that

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* Rizzieri was not charged with this distribution.

** Rizzieri plead guilty to the March 14th distribution in the Eastern District of New York later in 1973.

he and Rizzieri purchased two kilos of heroin for $56,000 from Ricco and Bragiole in December, 1972 (Tr. 200-05).

Count Four charged Rizzieri, along with Ricco and Bragiole, with distribution and possession with intent to distribute 461.9 grams of heroin on November 22, 1972. Although Ferrarone testified against Rizzieri with respect to this count, Rizzieri's conviction would have been doubtful without the testimony of Rossi.* Ferrarone's testimony implicating Rizzieri was limited to placing him at the scene of the November sale to him by Angiolillo. Rizzieri, according to Ferrarone, said nothing. It was only through Rossi that the Government could establish that Rossi and Rizzieri were obtaining large quantities of heroin in this period from Ricco and Bragiole and that one of their own heroin customers was Angiolillo. Based on this proof, all of which is ignored by Rizzieri, Rizzieri's active involvement on November 22nd became clear ** and his indictment, along with the indictment of his sources *** for his transaction, Ricco and Bragiole, followed.****

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* Rizzieri claims even now that his conviction on Count Four was based on insufficient evidence. (Br. at 21, n.**). How he reconciles this position with his argument that the Government should have charged him in March, 1973 with this offense is incomprehensible.

** Any claim that the Government delayed Rizzieri's prosecution on the February 8, 1973 sale of heroin he made to Ferrarone falls on its face because Rizzieri was not charged with this offense.

*** The conviction of Ricco for the November 22nd sale to Ferrarone, in addition to Rizzieri, establishes beyond question that the jury believed Rossi's testimony that during this time he and Rizzieri were obtaining their narcotics from Ricco. Ferrarone did not provide any testimony against Ricco.

**** Mengrone, who began to cooperate with the Government in April, 1975 (Tr. 1202), also provided corroborative proof against Rizzieri which linked Rizzieri to Rossi, Ricco and Bragiole (Tr. 1247-48, 1253).

In *United States* v. *Marion, supra*, the Supreme Court held that the Due Process Clause of the Fifth Amendment protects a defendant against pre-indictment delay only if he can establish that the delay substantially prejudiced his right to a fair trial *and* resulted from prosecutorial misconduct designed to harrass or to gain some tactical advantage over him. 404 U.S. at 324-25. *United States* v. *Schwartz*, Dkt. No. 75-1364 (2d Cir. April 20, 1976), Slip op. 3277, 3284; *United States* v. *Eucker*, 532 F.2d 249, 255 (2d Cir. 1976). It is axiomatic that delay attributable to a continuing investigation into a defendant's criminal activities or incomplete evidence does not constitute impermissible delay to gain a tacitcal advantage. *United States* v. *Schwartz, supra*, Slip Op. at 3284. See also *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966); *United States* v. *Finkelstein*, 526 F.2d 517, 525-26 (2d Cir. 1975), *cert. denied sub nom. Scardino* v. *United States*, 44 U.S.L.W. 3624 (May 3, 1976); *United States* v. *Foddrell*, 523 F.2d 86, 87-88 (2d Cir.), *cert. denied*, 423 U.S. 950 (1975); *United States* v. *Emory*, 468 F.2d 1017, 1019 (8th Cir. 1972); *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972); *United States* v. *De Masi*, 445 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); *United States* v. *Feinberg*, 383 F.2d 60, 65-67 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). Here, as in *Schwartz, supra*, the Government's case depended substantially upon the testimony of witnesses Rossi and Mengrone who only agreed to cooperate with the Government in 1974 and 1975, respectively.

Furthermore, Rizzieri has failed to allege or show any prejudice from the alleged delay, a prerequisite to relief under *Marion*. *United States* v. *Eucker, supra*, 532 F.2d at 255. *Cf. United States* v. *Finkelstein, supra*, 526 F.2d at 525-26; *United States* v. *Foddrell, supra*,

523 F.2d at 87-88; *United States* v. *Frank*, 520 F.2d 1287, 1292 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976). Indeed, he admitted through counsel in summation his participation in the February 8th and March 14th distributions (Tr. 2003).

Finally, notwithstanding Rizzieri's demand here for a hearing to determine the reason for the claimed "delay," he does not allege that he formally requested one below nor can we locate such a request in the record despite the fact that he was invited to do so by the court (Tr. 1111-12, 1115, 1514).

Coupled with his argument under *Marion*, Rizzieri contends that his conviction in 1973 in the Eastern District of New York for his March 14, 1973 distribution of heroin to Agent Ferrarone precluded the Government from charging him in this indictment on the grounds of double jeopardy. This claim is also baseless.

The dispositive answer to this contention is that the charges in the indictment here are different in law and in fact from the charge to which Rizzieri pleaded guilty in the Eastern District of New York and the evidence used to support his convictions here was different from the evidence which would have been used to support his 1973 conviction in the Eastern District of New York. *United States* v. *Papa*, 533 F.2d 815, 820 (2d Cir. 1976); *United States* v. *Cala*, 521 F.2d 605, 607 (2d Cir. 1975); *United States* v. *McCall*, 489 F.2d 359, 362 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974); *United States* v. *Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *United States* v. *Edwards*, 366 F.2d 853, 872 (2d Cir. 1966), *cert. denied sub nom. Jakob* v. *United States*, 386 U.S. 908 (1967);

United States v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961).*

In the Eastern District Rizzieri was charged only with his March 14th distribution of heroin to Ferrarone. He was not charged with conspiracy. Here he was charged in Count One in a massive conspiracy to distribute narcotics. The proof established that from approximately July 1972 through March 1973 Rizzieri made scores of heroin distributions along with Rossi to their numerous narcotics customers. Count Four charged Rizzieri with the distribution of 461.9 grams of heroin on November 22, 1972. Count Five charged him with the distribution of two kilos of heroin in November or December 1972. Clearly, the charges on their face in the Indictment here, and the evidence introduced to sustain them, are totally different from the 1973 Eastern District indictment, which related exclusively to the distribution of heroin Rizzieri made to Ferrarone on March 14, 1973.** It is well established that multiple violations of the narcotics laws arising out of a single transaction may be tried separately. *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457-58 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). As this court held in

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* Rizzieri was sentenced by Judge Lasker to five-years' imprisonment on each of the three counts on which he was convicted, the sentences to run concurrently with each other and concurrently with the sentence imposed upon Rizzieri on his plea of guilty to the Eastern District of New York narcotics indictment in 1973. It was Judge Lasker's intention, as he stated it, "that this sentence should not interfere with [Rizzieri's] release [on the Eastern District sentence]." Minutes of Rizzieri's sentencing proceeding on March 5, 1976 at 10.

** The Government did utilize evidence of Rizzieri's March 14th distribution to Ferrarone. This, of course, was proper, as the distribution was in furtherance of the conspiracy charged in the Indictment. *United States* v. *Campisi*, 248 F.2d 102, 107 (2d Cir.), *cert. denied*, 355 U.S. 892 (1957).

Ortega-Alvarez, "A charge of wide-ranging narcotics conspiracy consisting of numerous transactions is certainly sufficiently distinct from a charge of substantive violation based on a single sale." 506 F.2d at 457-58. Rizzieri offers no reasons whatsoever as to why the two substantive charges (Counts Four and Five) on which he was tried and convicted here would be barred by double jeopardy.

POINT VII

The evidence concerning Rizzieri's March 14, 1973 distribution of heroin was admissible.

Rizzieri's final contention is that the proof as to his March 14, 1973, heroin distribution to Ferrarone should not have been admitted because, he asserts, there was no evidence that he received the heroin from Ricco and Bragiole. He again ignores the record.

Rossi testified that after he stopped purchasing narcotics from Ricco and Bragiole in December 1972, Rizzieri continued to do so (Tr. 220). Moreover, when Ferrarone arrested Rizzieri on March 14th immediately after Rizzieri had handed him the package of heroin, Donovan, who was arrested with Rizzieri, told Ferrarone that Rizzieri had told him (Donovan) that Rizzieri had obtained the heroin from Bragiole (Tr. 867-68).* Finally, Mengrone testified that after Rizzieri's arrest he delivered a message to Ricco and Bragiole from Rizzieri to the effect that Rizzieri was "going to stand up and do the time and that nobody had to worry, and despite everything they might have heard that he was going

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* This testimony was elicited on cross-examination of Ferrarone by counsel for Rizzieri.

to take the fall himself and not implicate anybody" (Tr. 1251-54). Thus there was clearly sufficient evidence in the record to support the conclusion that Ricco and Bragiole were the source of the heroin which Rizzieri distributed to Ferrarone and this transaction was highly relevant to the charges being tried. See Fed. R. Evid. 401.

Even assuming, *arguendo*, that Rizzieri received the heroin from a source other than Ricco and Bragiole, the proof would have been nonetheless admissible as a concurrent or subsequent similar act on Rizzieri's part to reflect "a pattern of conduct of which the crime charged [was] a part." *United States* v. *Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971). See *United States* v. *Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DOMINIC F. AMOROSA being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of AUGUST, 1976 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Dominic F. Amorosa

Sworn to before me this
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Qualified in Richmond Cty.
Comm. Expires March 30, 1977